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U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2008

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the Form I-601 application will be approved.

The applicant is a native and citizen of Haiti who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission into the United States by fraud or willful misrepresentation. The applicant seeks a waiver of her ground of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The director determined that the applicant had failed to establish her U.S. citizen husband would suffer extreme hardship if the applicant were denied admission into the United States. The Form I-601 was denied accordingly.

On appeal the applicant asserts, through counsel, that because she is applying for adjustment of her status under Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) provisions, a more lenient standard of review for extreme hardship should have been applied. In support of this assertion, the applicant refers to 8 C.F.R. § 245.15(e)(2) provisions. The applicant additionally indicates that evidence contained in the record establishes that her husband would suffer extreme physical, emotional and financial hardship if the applicant were denied admission into the United States.

Through counsel, the applicant additionally asserts that, although not a basis of denial, inadmissibility grounds under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II) should be waived

Section 212(a)(9)(C) of the Act provides in pertinent part that:

Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.-Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

A Memorandum by [REDACTED] Acting Executive Associate Commissioner, entitled, "Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act), June 17, 1997, HQIRT 50/5.12 clarifies that:

Section 212(a)(9)(C)(i)(II) of the Act renders inadmissible those aliens who have been ordered removed under sections 235(b)(1) or 240 of the Act, or any other provision of law, and who enter or attempt to reenter the United States without being admitted. These aliens are also permanently inadmissible but may seek consent to reapply for admission from the Attorney General after they have been outside of the United States for 10 years.

Section 212(a)(9)(C)(i)(II) of the Act applies to those aliens ordered removed before or after April 1, 1997, and who enter or attempt to reenter the United States unlawfully any time on or after April 1, 1997. The alien may have been placed in removal proceedings before or after April 1, 1997, but the unlawful reentry or attempted unlawful reentry must have occurred on or after April 1, 1997.

The record reflects that the applicant was ordered excluded and deported from the United States on June 3, 1992. The applicant was deported on October 8, 1992. She reentered the U.S. unlawfully on December 16, 1992. The applicant has remained in the U.S. since that time, and she filed a HRIFA-based, Form I-485 application for adjustment of status on April 18, 2000.

Because the applicant's unlawful reentry into the U.S. occurred before April 1, 1997, section 212(a)(9)(C)(i)(II) of the Act inadmissibility provisions do not apply to the applicant. The assertion on appeal that section 212(a)(9)(C)(i)(II) of the Act inadmissibility grounds against the applicant should be waived is therefore moot. The applicant is, however, inadmissible under the grounds set forth in section 212(a)(6)(C)(i) if the Act.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part, that:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record reflects that in April 1992, the applicant sought admission into the United States by using a fraudulent passport. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(i)(1) of the Act provides that:

The Attorney General [now Secretary, Department of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

In the present matter, the applicant's spouse is a U.S. citizen. The applicant's husband is therefore a qualifying family member for section 212(i) of the Act purposes. It is noted that a U.S. citizen or lawful permanent resident child is not a qualifying family member under section 212(i), waiver of inadmissibility provisions.

Accordingly, hardship to the applicant's U.S. citizen children may be considered only to the extent that it causes hardship to the applicant's husband.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (Board) provided a list of factors that it deemed relevant in determining whether an alien had established extreme hardship. The factors included the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The Board held in *Matter of Ige*, 20 I&N Dec. 880, 882, (BIA 1994), that, "relevant [hardship] factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists."

"Extreme hardship" has been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. See *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996.) Court decisions have repeatedly held that the common results of deportation or exclusion [now, removal or inadmissibility] are insufficient to prove extreme hardship. See *Perez v. INS*, *supra*. See also, *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991).

The applicant indicates, through counsel, that because she is applying for adjustment of her status under HRIFA provisions, the director should have applied a more lenient standard of review when assessing hardship to the applicant's husband. In support of this assertion, the applicant refers to 8 C.F.R. § 245.15(e)(2) provisions.

The regulation states in pertinent part at 8 C.F.R. § 245.15(e)(2), that:

[I]f a HRIFA applicant is inadmissible under any of the other provisions of section 212(a) of the Act for which an immigrant waiver is available, the applicant may apply for one or more of the immigrant waivers of inadmissibility under section 212 of the Act, in accordance with § 212.7 of this chapter. . . . In considering an application for waiver under section 212(i) of the Act by an otherwise statutorily eligible applicant for adjustment of status under HRIFA who used counterfeit documents to travel from Haiti to the United States, the adjudicator shall, **when weighing discretionary factors**, take into consideration the general lawlessness and corruption which was widespread in Haiti at the time of the alien's departure, the difficulties in obtaining legitimate departure documents at that time, and other factors unique to Haiti at that time which may have induced the alien to commit fraud or make willful misrepresentations. (Emphasis added.)

The AAO notes that under section 212(i) of the Act, a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

The provisions contained in 8 C.F.R. section 245.13(e)(2) allow the U.S. Citizenship and Immigration Services (CIS) adjudicator to take into account Haitian country conditions when balancing the positive and negative factors of an applicant's case and determining whether favorable discretion should be exercised in a waiver of inadmissibility case. The provisions do not state that a more lenient standard of review should be used to

assess whether a HRIFA applicant has established that a qualifying relative would suffer extreme hardship if the Form I-601 were denied. Accordingly, the applicant is not entitled to a more lenient standard of review of hardship factors than that set forth in the legal decisions discussed above.

The record contains the following evidence relating to the applicant's husband's extreme hardship claim:

An April 24, 2006, affidavit signed by reflecting that he was born and raised in New York, and that he and the applicant have two children indicates that he and the applicant expect a third child to be born in May 2006. states that he was seriously injured in a work-related accident in August 2004, and that as a result he now has a desk job because he can no longer perform the duties of his job as an emergency medical technician for the New York Fire Department. He states that his physical condition has weakened him and affects his ability to care for his family. additionally states that he has suffered from Major Depression and Attention Deficit Disorder in the past, and he expresses fear that he would be unable to assume the responsibility of caring for, and raising his children given his physical and emotional problems, and taking into account the emotional trauma his young children would experience if their mother moved away. states that he also fears he would lose his job if he had an emotional breakdown. states that his family's income would be reduced by half if the applicant were not allowed to remain in the U.S., and he indicates that he cannot support his family on his own. states that political, economic, health, sanitation, employment and other conditions in Haiti are catastrophic, and he says it would be impossible for his children to go to Haiti with their mother given the conditions in the country.

An April 12, 2006, letter from a psychiatric social worker at the Tompkins County Mental Health Services in Ithaca, New York, stating that received individual psychotherapy at the mental health clinic from December 1996 to May 1998, and that his diagnosis was Major Depression, Recurrent (296.30) and Attention Deficit Disorder (314.01.)

An April 25, 2006, "Confirmation of Attendance" letter from the New York City Department Counseling Service Unit, verifying that attended the counseling service unit on April 25, 2006.

A June 10, 2005, letter from the New York City Fire Department, reflecting rank as, "EMT", and his unit as "EMS." The letter states that after a physical examination and thorough examination of records, the Medical Board Committee determined that duty status is unfit permanently, effective June 10, 2005.

Birth certificates for the applicant's two children.

Federal Wage and Tax statements reflecting that earned approximately \$32,000 in 2005, and that the applicant earned approximately \$39,000.

An estimate of the family's monthly expenses; a copy of auto insurance bills for January 2006, the family's 5-year term insurance obtained in May 2005; copies of car loan, credit card, and telephone and cable bill statements.

A copy of the 2005, U.S. Department of State (DOS) Country Report on Human Rights Practices in Haiti, reflecting that the government's human rights record remains poor, and that retribution killings and politically motivated violence exists throughout Haiti.

The AAO notes further the 2008, DOS Consular Information Sheet on Haiti which reflects that there are ongoing security concerns in Haiti, including frequent kidnappings of Americans for ransom. The Consular sheet states that there is a chronic danger of violent crime in Haiti, especially of kidnappings. "Most kidnappings are criminal in nature, and the kidnappers make no distinctions of nationality, race, gender or age; all are vulnerable." The kidnappings "have been marked by deaths, brutal physical and sexual assault, and shooting of Americans. The lack of civil protections in Haiti, as well as the limited capability of local law enforcement to resolve kidnapping cases, further compounds the element of danger surrounding this trend." The Consular Information Sheet states that travel in Port-au-Prince is always hazardous. The Consular Information Sheet states further that the U.S. Embassy limits or restricts travel by its staff and that this may constrain ability to provide emergency services to U.S. citizens outside of Port-au-Prince. See <http://travel.state.gov/travel>.

Upon review of the totality of the evidence, the AAO finds that the applicant has established her husband would suffer hardship beyond that normally experienced upon the removal of a family member if the applicant were denied admission into the United States and he traveled with her to Haiti. U.S. country conditions information for Haiti reflects that local law enforcement and U.S. Embassy staff protection is limited in Haiti, and that there is a chronic danger of violent crime and kidnappings of U.S. citizens in Haiti.

The applicant has also established that her husband would suffer extreme hardship if the applicant were denied admission into the U.S., and he remained in the country without her. The psychological documentation provided by the applicant reflects that [REDACTED] has a history of recurrent Major Depression and Attention Deficit Disorder, and New York Fire Department medical letters reflect that [REDACTED] has been deemed physically unfit for work in his profession as an EMT. The evidence reflects that [REDACTED] earns approximately \$32,000 a year working a desk job at the New York Fire Department, and the evidence reflects that [REDACTED] relies on the applicant's \$39,000 a year salary to help support their children and family. The evidence in the record reflects that the absence of a mother in his young children's lives, and worries about dangerous conditions faced by the applicant in Haiti, combined with [REDACTED] job-related limitations, reduced financial resources and his history of experiencing recurrent Major Depression would cause Mr. [REDACTED] to experience hardship beyond that normally suffered by a family member upon removal of a family member. The applicant has therefore established that her husband would suffer extreme hardship if the applicant's Form I-601 were denied and [REDACTED] remained in the United States, or if he moved with his family to Haiti. Accordingly, the applicant has satisfied the extreme hardship prong of section 212(i) of the Act.

The AAO finds that the applicant also merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States, which are not outweighed by adverse factors. *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957). In evaluating

whether relief is warranted in the exercise of discretion, the factors adverse to the alien may include the nature and underlying circumstances of the removal ground at issue:

[T]he presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996.)

The AAO must:

[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Matter of Mendez-Moralez*. at 300. (Citations omitted.)

As previously discussed, the regulation provides further at 8 C.F.R. § 245.15(e)(2), that:

[I]n considering an application for waiver under section 212(i) of the Act by an otherwise statutorily eligible applicant for adjustment of status under HRIFA who used counterfeit documents to travel from Haiti to the United States, the adjudicator shall, when weighing discretionary factors, take into consideration the general lawlessness and corruption which was widespread in Haiti at the time of the alien's departure, the difficulties in obtaining legitimate departure documents at that time, and other factors unique to Haiti at that time which may have induced the alien to commit fraud or make willful misrepresentations.

The following favorable factors exist in the present case:

The applicant has been married to a U.S. citizen for over nine years, and she has two young U.S. citizen children, and was expecting a third in May, 2006; the dangerous conditions the applicant and her U.S. citizen family would face if they moved to Haiti; the applicant's history of stable employment and her significant financial contributions to her family and household; the existence of unsafe conditions in Haiti at the time that the applicant initially attempted to unlawfully enter the United States, and later unlawfully reentered the United States in 1992; the fact that the applicant does not have a criminal record; the lack of evidence of bad character.

The unfavorable factors in the present matter are:

The applicant's attempt to procure admission into the United States by using a fraudulent passport in February 1992; the applicant's deportation to Haiti in September 1992, and her subsequent December 1992, illegal reentry into the United States after being ordered excluded; the applicant's unauthorized presence in the U.S. after December 1992.

The AAO finds that the immigration offenses committed by the applicant are serious in nature and cannot be condoned. The AAO finds, however, that when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

Section 291 of the Act provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has met her burden in the present matter. The appeal will therefore be sustained and the Form I-601 application will be approved.

The AAO notes that Section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A) pertains to aliens previously removed from the United States, and provides in pertinent part that:

(i) [A]ny alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) *Exception.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [Secretary] has consented to the alien's reapplying for admission (Emphasis added.)*

Counsel indicates that pursuant to 8 C.F.R. § 245.15(e)(3), only a Form I-601 may be necessary, and that the filing of a Form I-212, Application for Permission to Reapply for Admission into the United States may not be necessary for HRIFA, adjustment of status applicants. The AAO agrees. 8 C.F.R. § 245.15(e)(3) provides in pertinent part:

[A]n applicant for adjustment of status under HRIFA who is inadmissible under section 212(a)(9)(A) or 212(a)(9)(C) of the Act, may apply for a waiver of these grounds of inadmissibility while present in the United States. Such an alien must file Form I-601, Application for Waiver of Grounds of Excludability. . . .

In the present matter, the applicant is required only to file a Form I-601. The applicant complied with the requirement to file a Form I-601, and the AAO has found that the applicant qualifies for a waiver of inadmissibility under section 212(i) of the Act. As a waiver of section 212(a)(9)(A) of the Act requires a weighing of the positive and negative factors as done for the section 212(i) waiver, the AAO further finds that her request for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act is granted based on the discretionary factors noted above.

In proceedings for an application for a waiver of grounds of inadmissibility the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The application is approved.